A Call to Arms to Protect Latin American Leniency Programs

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In a recent article published by Competition Policy International[2], we commented on a monumental competition matter pending before a regional international authority until recently unknown to many antitrust practitioners: the Andean Community (CAN), comprised of four member states – Bolivia, Colombia, Ecuador and Peru – and empowered with several regional functions, including the review of anti-competitive practices with a community dimension.

The matter involves an unprecedented leniency breach that threatens the future efficacy of leniency programs throughout Latin America. Kimberly Clark signed the first leniency agreements ever with the Colombian (SIC) and Peruvian (INDECOPI) competition authorities, leading to record-breaking fines by those authorities in what would be known as the "soft paper" cartels. Other companies also participated in leniency applications in these proceedings. Kimberly Clark was also accepted into the leniency program of the Ecuadorian competition authority (SCPM). However, after an 18-month SCPM investigation followed by the closing and re-opening of a second soft-paper cartel investigation, the SCPM sent the documents, information and witness statements provided by Kimberly Clark in its corporate confession to the CAN, disregarding confidentiality rules, and the sanctity of basic leniency procedures.

Bringing even more tension to this extraordinary antitrust *novela*, the CAN technical staff ignored the SCPM's breach of confidentiality and the prior decisions of its member states to confer leniency for the reported conduct and recommended that KC and Grupo Familia pay the maximum fine allowed by the Andean Community statutes. On May 28, 2018, the CAN General Secretariat issued a decision, over the objection of the SIC and INDECOPI, to impose fines of over $34 million on KC and Grupo Familia (Resolution 2006). It was the first antitrust decision ever taken by the CAN where it asserted jurisdiction and imposed fines.

Since the matter has been made public, alarm bells have been ringing in the halls of Latin America's competition enforcement community. CAN's decision can lead to the destruction of the SIC's and INDECOPI's young but extremely promising leniency program and risks doing serious harm to leniency throughout Latin America. The region has been a hot spot for cartel enforcement in recent years. Competition authorities in Brazil, Chile, Mexico, Columbia and Peru have been aggressively prosecuting cartel activity and earning the confidence of the private bar and business community in the transparent and fair application of their leniency programs. However, going forward, a company will be less likely to voluntarily disclose regional or global conduct to the leniency programs in countries like Brazil, Chile and Mexico, if the company is left exposed to high fines in Columbia and Peru.

In unprecedented coverage of a South American case, the issue was raised by various specialized publications and discussed in a roundtable commissioned by the Competition Committee of the Organisation for Economic Co-operation and Development ("OECD"). The International Chamber of Commerce´s Competition Committee also included the issue in their most recent international reunion.

Most importantly, in an unheard of and aggressive move, Colombia and Peru have made public their decision to challenge CAN's decision and have presented formal reconsideration pleas to the Secretary General's decision (Resolution 2006). The two agencies attack the CAN decision on numerous grounds, including: (i) no jurisdiction over this particular case;

(ii) double-jeopardy issues (the same conduct is being prosecuted and sanctioned twice); (ii) lack of due process (illegal use of alleged evidence, the affected companies could not respond to economic and other analysis relied upon by CAN's technical staff); (iii) the absence of an actual investigation by the CAN (which simply used the same leniency documents presented by the signatories in the member-countries); and (iv) the complete disregard for the member-countries leniency programs, by wiping out the promised benefits in exchange for the applicant's collaboration. Colombia's and Peru's reconsideration pleas warn the CAN that this decision will undermine the progress they have made in fighting cartels, and threaten their ability to continue to utilize their leniency programs to detect cartel activity and protect Andean consumers.

The CAN decision has incited a dispute between national states and a regional organization; and provoked reactions from neighboring countries and international organizations, leaving much uncertainty. What will be the future of a regional organization that disregards the decisions and policies of its members? How will the member states be affected by the fact that their policies and autonomy are taken over by the decision of a regional organization with leniency program and no expertise fighting cartels? Most importantly, what will be the future of competition policies in the Andean region, and leniency policies, until such divergence is resolved?

The pleas for reconsideration present an opportunity to bring fresh eyes to the issues at stake and the implications to the future of cartel enforcement in the Andean region as well as throughout Latin America. With a formal petition for reconsideration presented by two competition authorities from member states of the Andean Community – Colombia and Peru – as well as the affected parties, the case will turn into a game changer for the region. For better or for worse.

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[2] Mena-Labarthe; Barahona; Carvalho and Frade. The end of leniency programs in the Andean Region?. CPI Latin America, April 2018.